Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1616

CARL ROBINSON, Warden,
Connecticut Correctional Institution, Somers,

Petitioner,

v.

ARCHIE CHESNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Carl Robinson, Warden of the Connecticut Correctional Institution at Somers, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to review the judgment of that Court entered on March 24, 1976, denying a petition for rehearing, and thus upholding a judgment of that Court dated February 6, 1976, affirming the order of the District Court for the District of Connecticut granting a petition for a writ of habeas corpus.

Opinions Below

The Court of Appeals for the Second Circuit did not issue any written opinion. The opinion granting the Respondent's Petition for a Writ of Habeas Corpus by the United States District Court for the District of Connecti-

cut is unreported and is attached hereto as Appendix B. The opinion of the Supreme Court of Connecticut sustaining the original conviction of Archie Chesney is found in 166 Conn. 630, —— A.2d ——. Respondent's petition for writ of certiorari was denied in 419 U.S. 1004, 95 S.Ct. 324, 42 L.Ed.2d 280.

Statement of Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 24, 1976. The statutory provision conferring on this Court jurisdiction to review that judgment by writ of certiorari is 28 U.S.C. § 1254(1).

Question Presented

The respondent's application for writ of habeas corpus presented essentially one limited issue for determination, and that was whether the trial judge's ruling precluding defense counsel on cross-examination from questioning a key witness as to whether he told the grand jury, which indicted the respondent, the same statement of the victim as he told the petit jury violated the Sixth Amendment rights of the respondent. Throughout the present phase of the case there has been no factual dispute, only a difference in regards to the legal effect of the trial court's exclusion of this line of cross-examination.

Simply stated the question presented for review in the terms and circumstances of the case is as follows:

> After the eyewitness to the homicide testified on direct examination that the victim told him at the scene that the respondent committed the act was it constitutional error to exclude on cross-examination a question asking the witness whether or not he related this statement to the indicting grand jury when he testified before it?

Constitutional Amendments Involved

The Respondent has sought and obtained relief under the confrontation clause of the Sixth Amendment as made applicable to the individual states by the Fourteenth Amendment.

Statement

On February 9, 1971, at approximately 11:30 a.m. Robert Lubas and his friend, James Lindsey, went to Apartment 703 of the housing complex known as the Beardsley Terrace Apartments in the City of Bridgeport in Connecticut. Present in the apartment when they arrived were Archie Chesney, his brother, Clarence Chesney, Alfred Peterson, and Richard Bush. Archie Chesney had in his possession a portion of a rifle which was inside a folded umbrella. An argument ensued between Lubas and Chesney during which the latter claimed Lubas owed him some money. Chesney told Lubas that he wanted to talk to him and they went down a hallway to the area of a bedroom. According to Richard Bush, he and Clarence Chesney attempted to break up the argument between the two and while he was facing Lubas he heard a popping sound and immediately turned around and grabbed a gun from Archie Chesney. Alfred Peterson observed Lubas go to the rear bedroom area with Chesney, heard an argument and a shot, and then saw Lubas as he was taken away by another person. After the shot was fired Lubas staggered up the hallway where he told Lindsey that Archie Chesney had shot him. Lindsey then transported Lubas to the hospital where he expired.

The rifle was turned over to the police and a comparison examination revealed that the bullet which was extracted from Lubas' body was fired from it. Paraffin casts were obtained from both hands of Chesney for the purpose of determining whether there was any gunpowder residue or

nitrates on them. The umbrella was similarly tested. These tests proved positive for the presence of gunpowder residue and nitrates indicating that Chesney had fired a gun through the umbrella. Tests on Lindsey's hands were negative.

On the evening of the murder when he was questioned at his apartment by the police Chesney initially identified himself as "Wade Harrington." After being fully advised of his constitutional rights Chesney related that he had not been involved in the shooting but in fact had been at a poolroom from 10:00 A.M. to 1:00 P.M. and then visited with his girlfriend, went to a barbershop and then back with his girlfriend until the police arrived. In addition Chesney denied owning a gun.

At the trial Chesney presented no evidence in his own behalf. It was during the cross-examination of James Lindsey that the claimed violation of the confrontation clause of the Sixth Amendment occurred. Lindsey had testified on direct examination by the state's attorney that immediately after the shooting Lubas told him that the respondent had shot him. Since Chesney was charged with murder it was necessary to indict him before a grand jury prior to formally lodging a murder charge against him. *Connecticut General Statutes,* § 54-45; Article First, Section 8 of the *Connecticut Constitution.* Chesney's counsel on cross-examination of Lindsey inquired whether he had told the grand jury that Lubas had told him that Chesney had shot him. This question was excluded by the trial judge. Chesney's defense counsel argued that this was proper cross-examination since it could lead to the impeachment of the witness on the basis that his testimony before the grand jurors was a prior inconsistent statement.

After Chesney's indictment by the grand jury he was put to trial before the petit jury on the charge of murder in the first degree in violation of then Section 53-9 of the Connecticut General Statutes. The indictment and subsequent trial occurred in the Superior Court for Fairfield County at Bridgeport, Connecticut. On May 28, 1971, after a full trial before the jury Chesney was found guilty of second degree murder in violation of then Section 53-9 of then Connecticut General Statutes. Pursuant to said judgment Chesney on June 4, 1971 was sentenced to a term of life imprisonment at the Connecticut Correctional Institution at Somers. The Petitioner Carl Robinson is the warden of that institution.

Reasons for Granting the Writ

The United States District Court for the District of Connecticut in granting Chesney's writ of habeas corpus relied heavily on *Davis* v. *Alaska,* 415 U.S. 308, and *Chambers* v. *Mississippi,* 410 U.S. 284. It found that the truncating of the cross-examination of Lindsey on the point of whether or not he told the indicting grand jury what the victim told him was a violation of Chesney's Sixth Amendment rights as made applicable to the individual states by the Fourteenth Amendment. Specifically the court held that there was not adequate cross-examination.

Chesney claims that his trial counsel should have been permitted to ask Lindsey on cross-examination whether or not he told the grand jury that Lubas had told him that Chesney shot him. Apparently the answer to this question was desired in an effort to impeach the testimony of Lubas. Of cardinal significance is the fact that no stenographic transcript is made of proceedings before the grand jury. As the Connecticut Supreme Court has recently stated:

> It is the general practice in most states not to require a stenographic record of the grand jury proceedings; 38 C.J.S., Grand Juries, § 44; and it is not required under the Federal Rules of Criminal Procedure. United States v. Caruso, 358 F.2d 184 (2d Cir. 1966), cert. denied, 385 U.S. 862, 87 S.Ct. 116, 17

> L.Ed.2d 88. In State v. Vennard, supra, we noted that, in view of the very limited purpose of the grand jury and the requirement of secrecy as to its deliberations, "We see no reason to permit a defendant to jeopardize that secrecy by recording in writing or otherwise what transpires merely for the purpose of making such an investigation a more effective tool for discovery." There is no constitutional or statutory right to have a stenographer present in the grand jury room and we find no error in the refusal of the trial court to permit it in this case. *State* v. *Delago,* 161 Conn. 536, 539-540, 290 A.2d 338.

The secrecy of grand jury hearings and the non-transcribing of testimony before that body have been a part of our law for the past 170 years. *Lung's Case,* 1 Conn. 428. Furthermore the informality and limited purpose of a grand jury as the accusatory body in capital cases has been recognized. *State* v. *Guay,* 25 Conn. Sup. 61, 64, 196 A.2d 599.

There exists no constitutional or statutory requirement that grand jury testimony be recorded. *Cobbs* v. *Robinson, Warden,* Civil No. 75-2089, 2nd Cir., Dec. 17, 1975; *United States* v. *Biondo,* 483 F.2d 635, 641 (8th Cir. 1973), cert. denied, ——U.S. ——, 94 S.Ct. 1468, —— L.Ed.2d ——; *United States* v. *Franklin,* 429 F.2d 274, 276 (8th Cir. 1970), cert. denied, 400 U.S. 967, 91 S.Ct. 380, 27 L.Ed.2d 387; 8 *Moore's Federal Practice.* The Grand Jury § 6.02n; 1 Wright, *Federal Practice and Procedure Indictment and Information,* § 103. See also *United States* v. *Youngblood,* 379 F.2d 365 (2nd Cir. 1967); *United States* v. *White,* 417 F.2d 89 (2nd Cir. 1969), cert. denied, 397 U.S. 912, 90 S.Ct. 910, 25 L.Ed.2d 92; *United States* v. *Ayres,* 426 F.2d 524 (2nd Cir. 1970), cert. denied, 400 U.S. 842, 91 S.Ct. 85, 27 L.Ed.2d 78; and *United States* v. *Cramer,* 447 F.2d 210 (2nd Cir. 1971). If the grand jury testimony of Lindsey had been transcribed, trial counsel would have been permitted

a copy under the provisions of Section 54-86b of the Connecticut General Statutes. This statute was later ruled unconstitutional in *State* v. *Clemente,* 166 Conn. 501, —— A.2d ——, but has been superseded by rule of court. *Practice Book,* §§ 533P and 533S. Grand Jury testimony since 1970 has been the subject of discovery in the federal courts due to the Jencks Act. 18 U.S.C. § 3500 (e)(3). Thus the lack of a transcript did not violate any of Chesney's constitutional rights.

The lower court presumably relied heavily on *Davis* v. *Alaska, supra,* and *Chambers* v. *Mississippi, supra,* in its determination that Chesney's right to cross-examination was unconstitutionally truncated. In Davis it was the use of a protective order which shielded the juvenile record of a key witness for the prosecution which this Court found anathema to constitutional principles. In Chambers a combination of the state's hearsay rule and voucher rule were used effectively to deny the petitioner's constitutional rights to subject to cross-examination a witness who had admitted to the crime on four occasions. Common to each case is the fact that evidence which the defense desired to place before the jury was virtually sitting in the lap of defense counsel. The prior record and the statements of McDonald were virtually common knowledge to all. With no transcript available in Chesney neither the state nor defense counsel knew what, if anything, Lubas told the grand jury. Thus the state in Chesney did not utilize a protective order or an anachronistic rule of evidence to thwart a fruitful cross-examination. The *Chesney* case just does not fall within the ambit of Davis and Chambers. It is more properly a situation where the trial judge was utilizing his discretion to limit cross-examination to relevant probative matters. Unlike the other cases this was a simple ruling on evidence without constitutional overtones.

Whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial court. *Grune-*

wald v. *United States,* 353 U.S. 391, 423-424; *United States* v. *Anderson,* 498 F.2d 1038, 1043 (D.C. Cir. 1974). The trial court in Chesney was faced with a dilemma. Absent an admission that he had testified differently before the grand jury the only way Lindsey's credibility could have been impeached would have been to have Chesney take the stand or to call in all eighteen members of the grand jury and test their individual recollections. Assuming it was necessary for one or both of the parties to call all of the grand jurors the possibility exists that there would be eighteen disparate memories. What then would have been the probative value of such a line of inquiry? The trial would have gone far afield of its intended goal. The purpose would have been lost in the confusion, ambiguity, and parade of witnesses. In view of the difficulties presented the trial court rightly exercised its discretion in limiting the cross-examination. The decision in the instant case is an illogical extension of *Davis* and *Chambers.*

Conclusion

It is respectfully submitted that the decision of the United States Court of Appeals for the Second Circuit is in conflict with the meaning of *Davis* v. *Alaska* and *Chambers* v. *Mississippi,* and for this reason and the reasons previously set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD F. JACOBSON
Assistant State's Attorney
for Fairfield County
Attorney for Petitioner

APPENDIX A

Judgment of the District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL ACTION NO. H-75-181

ARCHIE CHESNEY

v.

CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers

JUDGMENT

The above-entitled action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge;

And the Court, after a hearing on the Petitioner's Petition for a Writ of Habeas Corpus, having filed its Memorandum of Decision on November 13, 1975, finding that the Petitioner, in his trial, was denied a right guaranteed him by the Sixth and Fourteenth Amendments of the Constitution of the United States, and ordering a Writ of Habeas Corpus to issue out of this Court within twenty (20) days unless the State of Connecticut vacates the judgment of conviction of the Petitioner and schedules an early retrial;

It is accordingly ORDERED and ADJUDGED that the Petitioner's Petition for a Writ of Habeas Corpus issue out of this Court within twenty (20) days of the filing of said Memorandum of Decision unless the State of Con-

necticut vacates the judgment of conviction of the Petitioner and schedules an early retrial.

Dated at Hartford, Connecticut, this 21st day of November, 1975.

SYLVESTER MARKOWSKI
Clerk, United States District Court

By: (ILLEGIBLE)
Deputy-in-Charge

APPENDIX B

Memorandum of Decision of the District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL No. H-75-181

ARCHIE CHESNEY

v.

CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers

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MEMORANDUM OF DECISION

Archie Chesney, presently an inmate at the Connecticut Correctional Institution, Somers, Connecticut, brings this petition for a writ of habeas corpus to challenge the validity of his conviction for second degree murder. This court has jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. Petitioner alleges that he was denied his sixth amendment right to confront one of the witnesses who testified against him and that as a result he was denied the due process guaranteed by the fourteenth amendment.

I. *The History of this Case*

Petitioner was indicted by a grand jury for the crime of murder in the first degree on March 8, 1971. A jury in Fairfield County Superior Court returned a verdict of

murder in the second degree on May 28, 1971. On June 4, 1971, petitioner was sentenced to a term of life imprisonment. Appeal was taken to the Connecticut Supreme Court, which affirmed the conviction. *State* v. *Chesney,* —— Conn. ——, —— A.2d ——, 36 Conn. L.J. No. 4, at 21 (July 23, 1974). The United States Supreme Court denied certiorari. 419 U.S. 1004 (1974).

At the trial the State presented evidence to show that the decedent, Robert Lubas, and a companion, James Lindsey, went to an apartment where they met with several other persons, including the petitioner. Lindsey, testifying as a witness for the prosecution, stated that Chesney and Lubas went down the hallway into the kitchen where some other persons were present. He testified that he heard an argument and a popping noise, and then saw Lubas walking down the hall holding his chest. Lindsey then testified as follows:

"Q. What, if anything, was he doing as he walked down the hall?

"A. He was holding his chest.

"Q. Did you have an opportunity to observe his face at all?

"A. Yes, I did.

"Q. How did his face appear to you?

"A. Just like a little worried look on his face.

"Q. How was he manipulating, was he able to walk all right?

"A. Yes, he was like just leaning on the wall, you know, walking out.

"The Court: Did you say leaning on the wall?

"The Witness: You know, like brushing against the wall.

"The Court: Please keep your voice up. The jury must hear you.

"Q. Did you have some conversation with Robert Lubas?

"A. Yes, I did.

"Q. Using the exact words that were spoken between you, Mr. Lindsey, would you tell the ladies and gentlemen of the jury what was said at that time?

'A. Well, he said, 'Let's get the fuck out of here,' and then I says to him, 'What happened?' He said, 'The bastard shot me.' I said, 'Who?' And he said, 'Archie.'"

Tr. 30-31.

On cross-examination, petitioner's attorney attempted to question Lindsey about an inconsistency between his testimony at trial and his earlier testimony before the grand jury. It was Chesney's contention at that time, and he so testified at the evidentiary hearing on this petition, that in his grand jury testimony, Lindsey had not quoted the decedent as identifying Chesney as his assailant. Since Lindsey admitted having given a prior inconsistent statement to the police at the start of their investigation, and since Lindsey himself had been a suspect in the slaying, petitioner contended that the additional factor of an inconsistent statement to the grand jury would have greatly assisted him in convincing the jury that Lindsey had fabricated the purported identification. This, in turn, would have greatly weakened the prosecution's case since there was no other witness, either to the shooting or to the incriminating statement.

The prosecutor objected to the attempt to show the inconsistent testimony before the grand jury on the grounds that a failure to testify could not be inconsistent with a later statement. Tr. 39. The trial court sustained the objection on the joint grounds that a prior omission would not be inconsistent and that an attempt to question

a witness concerning his prior testimony before a grand jury would violate the Connecticut rule of secrecy of grand jury proceedings. Tr. 40-41.

Petitioner contends that this ruling deprived him of the constitutionally guaranteed right to cross-examine the adverse witnesses presented against him in a criminal proceeding.

II. *Exhaustion*

In its amended return to the petition, the State argues that the constitutional claim raised in this court was not directly passed on by the Supreme Court of Connecticut in the appeal from the petitioner's conviction. The State argues that he is still free to raise the issue either in a motion for a new trial, Conn. Gen. Stat. Ann. § 52-270, or in a state habeas proceeding, Conn. Gen. Stat. Ann. § 52-466; and therefore the petition should be dismissed for failure to exhaust state remedies. 28 U.S.C. § 2254.

The question, however, is not whether the State Supreme Court passed on the constitutional issue, but rather whether the "substance" of the claim was properly presented to them. *Picard* v. *Connor,* 404 U.S. 270, 278 (1971). Petitioners cannot be deprived of their timely access to a federal court by the failure of a state court to decide a properly presented constitutional issue. *Cf. Chambers* v. *Mississippi,* 410 U.S. 284 (1973).

In this case the constitutional issue was before both of the state courts which passed on the question. In the State Supreme Court, petitioner framed the issue raised as: "2. Did the court err in refusing cross examination of a witness as to his testimony before the grand jury?"[1] At the trial level the record shows that that court also was

[1] Brief of Defendant at 1, *State* v. *Chesney.*

aware of the constitutional dimensions of the petitioner's position.[2]

In his brief on appeal, petitioner relied heavily on *Chambers* v. *Mississippi* and *Williams* v. *Florida,* 399 U.S. 78 (1970).[3] In his motion for reargument, petitioner again relied explicitly on *Chambers.*[4] Though the Connecticut Supreme Court did not address the issue in its decision, and denied the motion to reargue, the substance of the claim was presented to that court for its consideration. Petitioner has fulfilled his duty to exhaust his state remedies, and the merits of his petition are thus properly before this court.

III. *The Constitutional Issue*

Evidentiary errors committed during the course of a state criminal trial are not subject to review in a federal habeas corpus proceeding unless such errors rise to constitutional dimension. *Jones* v. *Swenson,* 469 F.2d 535, 538 (8th Cir. 1972); *United States ex rel. Castillo* v. *Fay,* 350 F.2d 400, 401 (2d Cir. 1965); *Ferraro* v. *Connecticut,* No.

[2] During argument outside the presence of the jury the court stated:

> "Now, if you can show me some Connecticut case or some United States Supreme Court decision which upholds your position, Mr. Galluzzo, I shall certainly consider it."

Tr. 41.

[3] Brief of Defendant, *supra* note 1, at 5-7.

[4] "For the State to deny transcription on the one hand, then deny cross examination because there is no transcript, is to bootstrap procedure into injustice. If Lindsey should have told the Grand Jury about the decedent's statement and did not, that is important evidence. To permit evidence to be lost to a defendant does not comport with modern standards of justice and fairness. Chambers v. Mississippi, 35 L. ed. 2d 297 (1973)."

Defendant's Motion to Reargue, at 4-5.

B-74-288 (D. Conn., Sept. 8, 1975). However, the substantial denial of the right of cross-examination is markedly distinguishable from the erroneous exclusion of evidence.

In this case the petitioner claims that the decision of the trial court denied him the right to an effective cross-examination, which the Supreme Court has described as "constitutional error of the first magnitude" which "no amount of showing of want of prejudice would cure." *Smith* v. *Illinois,* 390 U.S. 129, 131 (1968). Consequently this court is free to review the state court determination.

The determination of the Connecticut Supreme Court does not purport to be based solely on the Connecticut provisions for secrecy of grand jury proceedings. The relevant part of the opinion states:

> "The proceedings of a grand jury are informal and untranscribed. Moreover, they are conducted in secret. *State* v. *Menillo,* 159 Conn. 264, 274, 268 A.2d 667. Thus, the form and manner in which the inquest was conducted relative to this witness, whether the witness had been asked to relate all the relevant facts or whether he had been asked questions which would have elicited the omitted facts, is unknown. It cannot be stated with any certainty that an omission in testimony before the grand jury constituted an inconsistency by which to impeach the witness' present testimony. See *State* v. *Mosca,* 90 Conn. 381, 391, 97 A. 340. Under these circumstances, the secrecy of the grand jury proceedings could not be invaded. See *State* v. *Coffee,* 56 Conn. 399, 410, 16 A. 151; *State* v. *Fasset,* 16 Conn. 457, 467."

36 Conn. L.J. No. 4, at 22.[5]

[5] The cases upon which the court relies, while they do deal with grand jury secrecy, do not support the court's position. In *State*

(footnote continued on following page)

Nor does the court deny that a failure to testify to a fact which would naturally have been mentioned is legally as inconsistent as a specific prior statement to the opposite effect.[6] Instead, the reasoning of the court appears to be that, since the grand jurors are sworn to secrecy,[7] and since there is no transcript of the grand jury proceedings,[8] there is no way in which the trial judge could properly determine the preliminary issue of whether a statement or omission before the grand jury was sufficiently inconsistent to justify its introduction for impeachment purposes.[9]

(footnote continued from preceding page)

v. *Fasset,* 16 Conn. 457, 466-67 (1844), the court states:

> "And it was early decided, that a grand-juror should not be allowed to swear what was give in evidence [*sic*] before the grand-jury, because he is sworn not to reveal the secrets of his companions. . . . An exception to this may be found when a witness testifies differently on the trial before the petit jury, from what he did before the grand-jury: then the grand-jury may be called to contradict him on that trial. . . ."

In *State* v. *Coffee,* 56 Conn. 399, 410, 16 A. 151, 152 (1888), the court cites *Fasset, supra,* with approval, and states:

> "Perhaps it would be proper to say that the oath has this implied qualification, that the testimony is to become secret unless a disclosure is required in some legal proceeding. It does not seem that the policy of the law should require it to be kept secret at the expense of justice."

Regardless of whether the Connecticut Supreme Court intended to effect a change in its law, or simply overlooked the critical exceptions to the rule of secrecy set out in these earlier decisions, the effect on petitioner's constitutional rights is the same.

[6] *See Schurgast* v. *Schumann,* 156 Conn. 471, 482, 242 A.2d 695, 701 (1968); McCormick, *Evidence* § 34 (2d ed. 1973).

[7] Conn. Gen. Stat. Ann. § 1-25.

[8] *State* v. *Delgado,* 161 Conn. 536, 539-40, 290 A.2d 338, 340 (1971). The failure to provide a transcript has been consistently upheld against constitutional challenge. *See, e.g., United States* v. *Ayers,* 426 F.2d 524 (2d Cir.), *cert. denied,* 400 U.S. 842 (1970).

[9] This appears to ignore two possible ways other than by use of a transcript in which the inconsistency could both have been

(footnote continued on following page)

This ruling, as affirmed by the Connecticut Supreme Court, deprived the petitioner of his opportunity to fully present to the jury his theory that the chief prosecution witness had fabricated a significant portion of his testimony, and, particular, the damaging accusation by the decedent.

It is true that the petitioner was able to demonstrate a motive for fabrication, both from the fact that Lindsey and the decedent were friends and from the fact that Lindsey himself had been considered a suspect in the killing. The petitioner also demonstrated that Lindsey had given a completely inconsistent account of the shooting in his statement to police. However, it is clear that the identification by the decedent was especially critical. The jury asked that it be reread to them (Tr. 270-71), and the Connecticut Supreme Court quoted it verbatim in its summary of the facts which the jury could have found. *State* v. *Chesney,* 36 Conn. L.J. No. 4, at 21. Lindsey was the only witness who testified to the identification. Had the petitioner been able to convince the jury that Lindsey had invented his testimony, the State's case would have been greatly weakened. Restricting questioning concerning such critical testimony involves more than what the Connecticut Su-

(*footnote continued from preceding page*)

shown as a preliminary matter and proved if necessary, if the witness were to have denied his earlier inconsistent omission. The first would have been to call the grand jurors themselves. This possibility seems implied in the Connecticut cases cited in note 5, *supra.* The second would have been for the defendant himself to testify to the inconsistency if he so chose. Under the Connecticut practice, the defendant is normally present during testimony before the grand jury. This allows the accused the opportunity to question the witnesses before the grand jury in an attempt to demonstrate the weaknesses in the State's case. *State* v. *Menillo,* 159 Conn. 264, 268 A.2d 667 (1970); *State* v. *Hamlin,* 47 Conn. 95 (1879). The accused is not sworn to secrecy. Conn. Gen. Stat. Ann. § 1-25.

preme Court characterized as a permissible exercise of a trial judge's discretion concerning the proper scope of cross-examination.

This court is not required to find that the trial would have had a different result had the petitioner been allowed to carry out his line of impeachment. As Chief Justice Burger stated in *Davis* v. *Alaska,* 415 U.S. 308, 317 (1974):

> "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness'] testimony which provided 'a crucial link in the proof . . . of petitioner's act.' *Douglas* v. *Alabama,* 380 U.S. [415], at 419 [1965]."

See, also, United States ex rel. Washington v. *Vincent,* No. 75-2100 (2d Cir. Nov. 5, 1975) at 384-85.

The interest which Connecticut asserts in the secrecy of grand jury proceedings cannot outweigh the importance of the petitioner's right to cross-examine adverse witnesses. In *Chambers* v. *Mississippi,* 410 U.S. at 295, the Supreme Court stated:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth determining process.' *Dutton* v. *Evans,* 400 U.S. 74, 89 (1970); *Bruton* v. *United States,* 391 U.S. 123, 135-37 (1968). It is, indeed, an essential and fundamental requirement for the kind of a fair trial which is this country's constitutional goal.' *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965). Of course,

> the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E.g. Mancusi* v. *Stubbs,* 408 U.S. 204 (1972). But its denial or significant diminution calls into question the ultimate '"integrity of the fact-finding process"' and requires that the competing interest be closely examined. *Berger* v. *California,* 393 U.S. 314, 315 (1969)."

In *Davis* v. *Alaska,*[10] the right to cross-examine was held to outweigh the State's interest in maintaining the secrecy of juvenile court proceedings, an interest which had been more consistently asserted than the interest in question here, which apparently has been interpreted in the present case to prohibit a practice which had previously been approved.[11]

In the analogous situation the Supreme Court has held, as a matter of supervision over the lower federal courts, without reaching the constitutional issue, that in federal criminal proceedings the interest in secrecy of grand jury proceedings must yield to the interest in searching cross-examination in circumstances similar to those presented here. *Dennis* v. *United States,* 384 U.S. 855 (1966). *See also* McCormick, *Evidence* § 113 (2d ed. 1973).

It is the conclusion of this court that the petitioner, in his trial, was denied the right to an adequate cross-examination, guaranteed to him by the sixth and four-

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[10] Although *Davis* was decided after the Connecticut Supreme Court rejected the petitioner's appeal, the decision did not establish a new rule of constitutional law, but rather applied a settled rule of law to a new set of facts. *Cf. Williams* v. *United States,* 401 U.S. 646, and *Mackey* v. *United States,* 401 U.S. 667, 675 (1971) (Harlan, J. dissenting).

[11] *See* note 5, *supra.*

teenth amendments, and that as a result his conviction cannot stand. Petitioner is therefore presently in custody in violation of the Constitution of the United States. 28 U.S.C. § 2254.

It is Ordered that a writ of habeas corpus should issue out of this court discharging the petitioner, Archie Chesney, from custody unless within twenty (20) days the State of Connecticut vacates the judgment of conviction and schedules an early retrial.

Dated at Hartford, Connecticut, this 13th day of November, 1975.

M. Joseph Blumenfeld
United States District Judge

APPENDIX C

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February one thousand nine hundred and 76.

Present: HON. PAUL R. HAYS,
HON. WILLIAM H. MULLIGAN,
HON. MURRAY I. GURFEIN,
Circuit Judges.

Dkt. 75-2147

ARCHIE CHESNEY,
Petitioner-Appellee,
—against—

CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers,
Respondent-Appellant.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

Judgment of the Court of Appeals.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the Memorandum of Decision filed below by Hon. M. Joseph Blumenfeld.

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PAUL R. HAYS

WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN

MURRAY I. GURFEIN
MURRAY I. GURFEIN